United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1777

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P/S

ORIGINAL

To be argued by
IRA JAY SANDS

In the United States Court of Appeals

For The Second Circuit

ESTHER FRIEDLANDER as Surviving Executrix of the Estate of Raphael Cohen,

Plaintiff-Appellant,

- against

PETER I. FEINBERG, SAMUEL SOKOL, WEBB & KNAPP, INC., LOUIS ADLER, MARVIN GREENSPAN, WILLIAM ZECKENDORF, ZECKENDORF HOTELS CORPORATION, DRAKE ASSOCIATES, ALFRED KAPLAN, DOMAX SECURITIES CORP., AGRIN LAWSON & HOLLAND and HARRIS, KERR, FORSTER & COMPANY,

Defendants-Appellees.

Appeal from Order of the United States District Court for the Southern District of New York.

BRIEF FOR PLAINTIFF-APPELLANT

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BRIEF FOR PLAINTIFF-APPELLANT

INTRODUCTORY STATEMENT

Plaintiff-Appellant Esther Friedlander, as Surviving Executrix of the Estate of Raphael Cohen, deceased, appeals from an order of the United States District Court for the Southern District of New York, dated and entered

April 22, 1974 (A-217), denying plaintiff-appellant's motion for class designation.

QUESTION PRESENTED ON THIS APPEAL:

Did the District Court Err in Denying Plaintiff-Appellant's Motion for Class Status?

STATEMENT OF FACTS

This action was commenced by filing the complaint June 17, 1970 (Docket entries A-1). Issue was joined by filing answers after preliminary stipulations of extensions of time. Reduced to necessary essentials for purpose of this appeal, the complaint (A-11) alleged violations of Section 17(a) of Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Rule 10b-5 thereunder, Sections 352-c and 352-e of New York General Business Law and common law, in sale of limited partnership securities of defendant Drake Associates. The action was commenced by Esther Friedlander, plaintiff-appellant, and her late brother Abraham Cohen, as co-executors of the estate of their father, on behalf of themselves and all other purchasers of limited partnership interests in Drake Associates, similarly situated. Due to the death of Abraham Cohen, duly noted on the record, this appeal is being prosecuted by Esther Friedlander, as surviving executrix.

The complaint, in plaintiff's prayer for relief at page nine, requested that the court designate the action a class action and authorize giving of appropriate notice to members of the class (A-31).

Among the defendants were William Zeckendorf, a once prominent New York realty promotor and various Zeckendorf hotel enterprises. Prior to institution of this action, Zeckendorf and certain of these entities became involved in bankruptcy proceedings, the major one being entitled In The Matter of William Zeckendorf a/k/a William Zeckendorf, Sr., Debtor, Southern District of New York, Index No. 68B750. Plaintiff's counsel was firmly advised by Zeckendorf's counsel shortly after commencement of this litigation (A-58) that a restraining order entered in those bankruptcy proceedings by Referee Asa S. Herzog, stayed all actions in any court in which Zeckendorf was named a defendant (A-56). It stated:

> "...it is ORDERED that any and all persons be and they hereby are stayed, restrained and enjoined from proceeding in any Court wherein the above-named debtor is a defendant until final decree in the above entitled proceedings or until further order of this Court,..." (A-56).

Lengthy pretrial procedures took place, including protracted depositions of plaintiff Cohen by defendants, multiple conferences and answers to defendants' interrogatories. Finally the Court below suggested in mid-1973 that since the Zeckendorf bankruptcies had now been sufficiently advanced toward finality, Referee Herzog's stay should no longer be a bar to the plaintiff. Further that defendants must either finally make their belated and long delayed threshold motion for summary judgment (statute of limitations) or else reserve it for trial. Ultimately after more delay, defendants filed that threshold motion.

The summary judgment - statute of limitations question had been urged by defendants from soon after commencement of the action. Since it was threshold, it was agreed that it should be preliminarily decided before the case could proceed apace. As the record repeatedly indicates, even after constant urging by plaintiffs and despite the orders of the Court with deadlines, defendants withheld making that threshold motion until much more urging by plaintiffs to get it out of the way and let the case proceed. It was finally made by defendants June 12, 1973 and denied 7 months later on January 22, 1974.

Only 28 days later, plaintiffs renewed and formalized their request for Rule 23 class determination, initially made as part of their complaint. The motion (A-33) returnable March 8, 1974, was adjourned to March 15, 1974. Plaintiff appeals from the denial below (A-217).

POINT I

THE DISTRICT COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR CLASS DESIGNATION

The question presented on this appeal is that based on the facts of this case, did the Court below err in denying plaintiffs' Rule 23 Motion for class designation?

The factual pattern which developed in this matter must be examined. This action involves complex questions of federal securities law and violations of New York State and common law. Delays between various stages of this type of litigation are common, as they require extensive preparation and review at each stage.

1. THE ZECKENDORF RESTRAINING ORDER

Promptly after commencement of the action, June 17, 1970, plaintiff began working on initial discovery of the

various defendants (A-43 ¶17). Included was William Zeckendorf and various Zeckendorf business enterprises. As amply documented in the record, Mr. Zeckendorf's position (restraining order) in this litigation is a key to plaintiff's position with respect to delay of class motion. (Affidavit in support of Rule 23 motion (A-34, A-43-47 ¶17-26), and Exhibits (A-56 to A-66)).

Promptly after service of the complaint on Mr. Zeckendorf, his counsel, Paul, Weiss, Goldberg, Rifkind, Wharton & Garrison, on August 5, 1970 advised plaintiff's counsel in writing (A-58) of the bankruptcy proceedings and the broad restraining order of Referee Herzog (A-56). After receipt of a copy of same, plaintiffs' counsel unsuccessfully attempted to convince Paul Weiss that the effect of the restraining order on Mr. Zeckendorf was limited, and indicated their desire that the case proceed as to the other defendants (A-60). But Mr. Zeckendorf's counsels' response was prompt and advised that (A-59):

> "...the language of the restraining order with respect to Mr. Zeckendorf goes beyond merely restraining proceedings against him as a defendant. Rather, the order, as we read it, enjoins any steps in any action in which Mr. Zeckendorf is named as a defendant, whether these steps involve Mr. Zeckendorf, another defendant, or anyone else."

A careful rereading of the restraining order (A-56) indicated to plaintiff that Zeckendorf's counsel was correct, which fact was confirmed by telephone communication with Referee Herzog's chambers (A-44, ¶19). Further, due to the restraining order, it was then not possible to proceed even with discovery of any defendants by plaintiffs. Plaintiffs did, however, early expend considerable effort in prosecuting, to discover documents of this litigation from public archives, such as SEC in Washington, New York Times, real estate syndicate brokers and others. This was the extent of what plaintiffs were allowed to do. (A-45, ¶21). Indeed, as late as May, 1973, Zeckendorf's counsel still held firm in their position that the restraining order still stayed plaintiffs from taking any steps in the action (A-61).

On May 15, 1973, plaintiffs' counsel advised Zeckendorf's counsel of a conference before the Court in which Judge Ward opined that Zeckendorf bankruptcy matters had now proceeded to the point where the restraining order was no longer essential for Zeckendorf's protection and that plaintiff's counsel felt"...no longer handicapped by being able to move with respect to the Zeckendorf interest. This was one of the earlier problems in movement of the case..." (A-46, ¶23).

Finally on May 23, 1973, Zeckendorf's counsel bowed to the expressed desire of the Court below and of plaintiffs' counsel to move the case forward expeditiously and they agreed to no longer utilize Referee Herzog's stay to block certain document discovery but to now give limited cooperation toward moving the case forward. (A-64).

During this period, defendants extensive discoveries of plaintiff Cohen were permitted for purposes of preparation of defendants' threshold summary judgment motion. Many deposition sessions of Cohen were held and documents produced. Obviously, its effect on Zeckendorf could only be beneficial. Should the motion for summary judgment have been granted, it would have rendered the restraining order academic. The action would have terminated. Should the motion be denied, the Zeckendorf position would not be harmed. Thus defendants used the stay as a shield.

2. DEFENDANTS' THRESHOLD STATUTE OF LIMITATIONS SUMMARY JUDGMENT MOTION DELAY:

The record is clear that defendants early indicated a desire to make their threshold summary judgment motion and caused all else to be shelved. Indeed the whole thrust of defendants' discovery methods (interrogatories, document production and depositions) and of the many conferences, including those with the Court below, were pointed to that

motion. (A-45,¶20, A-47 to A-52, A-63 to A-66).

As early as September 3, 1970, defendants indicated awareness that the statute of limitation - summary judgment issue was paramount and to be resolved prior to further proceedings. In a letter from Messrs. Pollack and Singer, counsel for certain defendants (A-210), it was unequivocably stated:

> "...it was my understanding that you were going to permit me to examine the plaintiffs before trial and that we were then going to test the issue of the statute of limitations before any further proceedings in the action were taken."

Plaintiff again and again requested that defendants expeditiously make their statute of limitations motion since plaintiffs Rule 23 motion was being delayed due to pendency of defendants' threshold question. The letter of May 26, 1972 is but an example (A-68). Despite defendants' belated protestation that this was not the case (A-116), they had been insisting from at least the inception of their depositions of Cohen that their summary judgment motion was considered "threshold" and to have precedence over plaintiffs' formal Rule 23 motion and general discovery (A-50, ¶38, A-69-70). Indeed, the whole purpose and thrust of the Cohen deposition and document production in spite of the restraining order against plaintiffs, was to enable defendants to prepare their summary judgment motion.

However even as late as May 1973, defendants had not made the impatiently awaited motion. This was again strongly brought to defendants' attention on numerous occasions by telephone, in conferences at the court, by the court and in exchanges of correspondence (A-71, A-192,¶24, A-201).

Since defendants would not permit discovery, even of documents because of their two-fold shield of (a) the threshold motion, and (b) the Zeckendorf stay, plaintiffs did discover documentary evidence from the SEC files (Drake Associates had been an SEC registered offering), newspaper notices of Zeckendorf financial matters in 1960, bankruptcy files as they reflected Zeckendorf financial ability in 1960 to perform its multi obligations, to Drake and to other realtors, hotel occupancies in 1960, etc. Plaintiff contends that the record shows forward movement by plaintiff as permitted under the circumstances (Docket entries A-1 to A-10). (A-45, ¶21).

In a letter to defendants on April 23, 1973, plaintiffs emphasized that the summary judgment motion must be promptly made, pointing out that the motion would govern procedures for the rest of the case (A-197). Again on May 7 and 10, 1973, plaintiffs reiterated that their threshold motion must be

made as it was delaying plaintiffs' discovery as well as plaintiffs' class motion (A-71, A-69).

That the summary judgment motion was still considered by defendants also as crucial to the case, was indicated by defendants' letter to the Court on May 31, 1973, in which defendants stated they would not meet the Court imposed deadline for making that motion but still considered the motion to be depositive of the entire case (A-201). The court permitted further delay. This clearly indicates that plaintiff's contention is correct and both the parties and the Court attached primary importance to defendants' threshold motion which, if granted, would be dispositive of the entire litigation.

The accuracy of plaintiffs' contention is further indicated by the fact that defendants took no action whatever to deny plaintiffs' class status, nor had they done so since inception of the action despite the clear class demand in plaintiffs' prayer for relief (A-31) and the requirements that defendants take steps under Local Rule 11A.

As stated above, defendants' motion for summary judgment was ultimately denied by the Court below January 22, 1974. Twenty eight days later, on February 19, 1974, plaintiffs moved for class determination (A-33).

It is well documented that although Rule 23(c)(1)

requires determination "as soon as practicable", courts often grant class status after a substantial period. In the Southern District of New York are numerous cases in which class status was determined years after commencement of the suit. In Fields v. Wolfson, 66 Civ. 3068, the action was commenced 1966, Rule 23 motion made 1972, and class determined 1972. In Waltman v. Silverman, 66 Civ. 1182, action was commenced 1966, Rule 23 motion made 1970 and class determined 1971, In Cohen v. Tenney, 67 Civ. 4187, action was commenced 1967, class motion made 1970 and class determination 1971. Weinberger v. Integrated Container Company, 69 Civ. 2284, commenced May, 1969, class motion made February, 1970 and class determined 1971.

Even in cases commenced after adoption of Local Rule 11A class status has been granted where the motion was not made within precise time limits, even without reasons for such delay as here exist. In Bergen and Wertel v. Kramarsky, 71 Civ. 5439, action was commenced 1971, the Rule 23 motion made 72 days after commencement, and class granted 1974. In Carmi v. Delta Corp., 72 Civ. 1095, commenced 1972, the motion was made 85 days after filing, class was granted 1974.

In its opinion here, the District Court held that plaintiffs did not move timely for class determination; therefore had not diligently prosecuted and denied class status. Plaintiff contends that this finding is directly

contrary to fact.

Furthermore, this determination has the practical effect of destroying possibility of recovery for all members of the class.

The court's reasons below obviously flow into each other; lack of diligent prosecution is evidenced by "untimeliness" of plaintiffs' Rule 23 motion. It is plaintiffs' contention that the motion was timely under all the circumstances of this case and that those circumstances which required a lapse of time prior to making the Rule 23 motion also mandated the slow pace of the various pretrial proceedings. If defendants' summary judgment motion, as endlessly delayed, was not called "untimely", even after the Court so indicated, then it is inappropriate to adopt a different yardstick under these facts to call plaintiffs' motion untimely. Any delay was occasioned by defendants at least as much as by plaintiffs. Defendants were not and have never been prejudiced by delay. Yet the class is most certainly prejudiced by denial of class determination.

Plaintiff further contends that the class determination request was properly before the court below from the very commencement of the litigation as it was included in the prayer for relief in plaintiffs' complaint (A-31). Accordingly, defendants and the Court had the right and also the

duty to act with respect to class determination in the absence of plaintiffs' formalizing the request by a Rule 23 motion (see infra page 15). It is well documented and is the law of this Circuit that the Federal Rules of Civil Procedure are to be liberally construed. Substance is to take precedence over form. Plaintiffs requested class status simultaneously with commencement of this action. Defendants and the Court below were aware of the relief requested. Plaintiff should not be now penalized for delaying formal motion when neither defendants nor the Court ever raised any opposition to plaintiffs' request for class determination in the pleadings. It is clear that their failure to do so was because Referee Herzog's stay and defendants' summary judgment motion were considered two valid reasons for delaying the Rule 23 motion.

As stated in Frost v. Weinberger, 375 F.Supp. 1312, 1318, 1319 (E.D. N.Y. 1974) (in a statement which could truely have been written for our own case):

> "From its inception, this lawsuit has been denominated as a class action, and there is a presumption that class action status exists despite the fact that no formal declaration to that effect has been made by this court. See 3B.J. Moore. Federal Practice, ¶23.50, at 23-1103; Gaddis v. Wyman, 304 F.Supp. 713, 715 (S.D.N.Y. 1969); see also C.A. Wright, Class Actions, 47 F.R.D. 169, 182 (1970)."

In reaching its determination that plaintiffs' Rule 23 motion be denied, the Court below cited Local Rule 11A:

> "(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed.R.Civ.P. 23(c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge."

However, it must be emphatically noted that the Rule is not silent as to the affirmative duty of defendants in connection with class action motions. Rule 11A(d) states:

> "If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within thirty (30) days after expiration of the time allowed for such motion, to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances."

Thus, it is clear from reading both the relevant sections of Local Rule 11A, that the burden is not only upon the party asserting the class action, but also upon the party opposing it, to move in respect to such an action. Moreover, the Rule does not say "may" move, it says "shall" move. Our defendants however made no such motion; yet, they knew that class status was requested from inception. Indeed, the court may, even on motion of the party opposing class action, find that a suitable class exists and determine that class status be allowed.

It is undisputed in this action that neither plaintiff nor defendants made the early class motion required under Local Rule 11A (docket entries of Appendix A-1-A-10). However, as noted above, plaintiff did incorporate a class request in the complaint (A-31). While plaintiffs refrained from formal motion due to circumstances of the bankruptcy restraining order and the summary judgment motion, defendants did nothing to indicate opposition. If plaintiffs failed to timely make the motion under Rule 11A(c), then defendants likewise failed completely to even make their required "no-class" motion under Rule 11A(d).

Rule 23(c)(1), Fed.R.Civ.P. does not place a time limit on determination of class status. It states:

> "As soon as practicable after the commencement of an action brought as a class action, the court

> shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional and may be altered or amended before the decision on the merits."

Clearly, this by itself does not mandate a hard and fast rule setting forth precise time limits but rather rquires the class determination to be made at the earliest practically-sound moment as determined by circumstances of the particular case. Wilcox v. Commerce Bank of Kansas City, 474 F.2d 336 (10th Cir. 1973); Berman v. Narragansett Racing Association, 48 F.R.D. 333 (D.C.R.I. 1969).

In Feder v. Harrington, 52 F.R.D. 178, 181-182 (S.D.N.Y. 1970), (commenced 1967 with class determination decided December 1970) decided after Local Rule 11A had been adopted, the Court found:

> "With regard to plaintiff's alleged delay in seeking class determination, defendants cite no authority and this Court is aware of none which requires withholding class determination solely because of a delay in bringing on the motion. While Rule 23(c)(1) seeks to discourage unnecessary delays in moving for class determination, absent a showing of prejudice to either the class or the defendant, denying the motion would seem to be a harsh result which could prejudice the class....."
>
> "...this Court absent a showing of prejudice, is nevertheless constrained to find the delay not significant enough to deny the motion...."

Neither our defendants nor the Court below have shown prejudice to defendants from granting class status at this time, nor can they.

The Court below misstates (A-217) plaintiffs' position with respect to the Zeckendorf bankruptcy question by noting only two letters of the broad correspondence between plaintiffs' counsel and Zeckendorf's counsel with respect to the effect of the restraining order. (Order of Ward, J., A-221). While the court notes the letter of Zeckendorf's counsel of August 5, 1970 (A-58) which first informed plaintiffs of the restraining order and the letter of plaintiffs' counsels' in response of August 17, 1970 (A-60) which indicated plaintiffs' intention to proceed against all other named defendants, the court below did not mention the letter of Zeckendorf's counsel of August 24, 1970 (A-59) which responded to that letter and which flatly expressed the opinion that the restraining order completely stayed all plaintiffs' action in the case, a position which plaintiffs reluctantly conceded was correct only after careful review of the restraining order and verbal communication with Chambers of Referee Herzog (A-44), ¶19).

It is the entire exchange of correspondence and review which convinced plaintiffs that the order restrained all action. Plaintiffs thus were forced to change the position

expressed in plaintiffs' letter of August 17, 1970. It is wrong for the Court below to ignore the totality of correspondence (A-58 to A-60, See also A-71, A-72), and base its order on only a fragment thereof (Opinion A-221).

Neither the parties nor the court sui sponte took formal class action steps. It seems clear that all parties and the court long labored under the impression that the formal class motion was properly delayed. If the plaintiffs did not fulfill their obligation to move under Local Rule 11A (c) or Fed.R.Civ.P. 23(c)(1), then the defendants likewise failed in their obligation under Local Rule 11A(d). But the Court below recognized valid reason for delay, since it did not see it necessary to fulfill its own duty to make a class determination even absent a motion under Rule 23(c)(1). In Jackson v. Cutter Laboratories, Inc., 338 F.Supp. 882, 886 (E.D. Tenn. 1970), a Civil Rights class action, the court taking note of its responsibility under Rule 23(c)(1) stated:

> "Although no objection has been filed with regard to permitting this action to proceed as a class action, Rule 23(c), Federal Rules of Civil Procedure, would appear to impose upon the Court the obligation of determining whether a class action is maintainable."

In Weisman v. MCA, Inc., 45 F.R.D. 258, 260 n.1, (D.Del. 1968), a shareholders securities action, both sides moved for class determination under Rule 23(c)(1). After discussing the Rule 23(c)(1) requirement for prompt determination of class status the Court stated:

> "The Court does not suggest that this determination under Rule 23(c)(1) need be made only on motion of the parties. On the contrary, the Rule indicates that the Court has an obligation to proceed under 23(c)(1) even in the absence of proper motion. See Frankel, Some Preliminary Observations Civil Rule 23, 43 F.R.D. 39, 40-41 (1967)."

In Jeffrey v. Malcolm, 353 F.Supp. 395, 396-397, (S.D.N.Y. 1973), before citing Weisman v. MCA, Inc., supra and Frankel, Some Preliminary Observations Concerning Civil Rule 23, supra, and Vol. 7A Wright & Miller, Federal Practice and Procedure §1785 (1972), Judge Pollack stated:

> "Although the complaint is styled as a class action, its status as such has yet to be confirmed. Local Rule 11A(c) of this district requires a party attempting a class suit to move within 60 days after the filing of the class allegations for confirmation by the Court of the class. No such motion has been made, nor did defendants move, as provided by Local Rule 11A(d), to strike the class allegations. According to Fed.R.Civ.P. 23(c)(1), 'as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.' Even if no motion is made for the ruling available to the parties respectively as provided by the Local Rule, the Court, on its own, should proceed at an appropriate occasion to review the proposed class."

Since neither side nor the Court followed their stated class obligations herein and since only plaintiffs have any rational excuse, why penalize plaintiffs?

Clearly, where neither side has moved for class determination and the Court itself has not made a determination either way, class status should not be denied to plaintiffs - especially where plaintiffs included in their prayer for relief a request for class status and then formally moved within 28 days after denial of the long awaited threshold summary judgment motion, which could have terminated the entire lawsuit. Separate from the Zeckendorf restraint, until there was a determination that this action could go forward, a class motion was premature. Weiss v. Tenney Corporation, 47 F.R.D. 283 (S.D.N.Y. 1969), Wilcox v. American Bank of Kansas City, supra, Berman v. Narragansett Racing Association, supra.

In its opinion below, the Court cited Dienstag v. Bronsen, 68 Civ. 576 (L.J.G.) (S.D.N.Y. May 12, 1972) as authority for untimeliness of the motion and absence of diligent prosecution. (The other two cases cited by the Court below, Mersay v. First Republic Corporation of America, 43 F.R.D. 465 (S.D.N.Y. 1968) and Taub v. Glickman, CCH Fed.Sec.L.Rep. ¶92,874 (S.D.N.Y. Dec. 1, 1970) are, in our opinion, totally unrelated to the facts at issue here.) In Dienstag there was no remote reason offered for delay. The Court noted that the caption named twenty-two defendants, yet plaintiffs prosecuted against seven. Furthermore, that Court noted that the stay in Dienstag was only as to deposition of two (criminal) defendants, not against any others. Yet Dienstag did nothing. This is a far cry from our case where extensive controversial discoveries of plaintiff Cohen did take place and where

defendants deftly utilized a total bankruptcy restraining order against all plaintiffs' action in the entire litigation, and also defendants' long discussed threshold motion was finally made only after repeated urging by plaintiffs and the court. Since defendants had priority of discovery because of that motion and court conferences reaffirmed the priority of the statute of limitations question, (A-71) even plaintiffs' desire to begin formal discovery was prevented (A-50,¶38, A-69, A-70 ftn.). Only after the motion was made and Judge Ward opined that the bankruptcy was no longer a bar, did plaintiffs formally see some Drake documents.

In its opinion (A-219-220) the Court below refers to delay by plaintiffs, but does not even now consider or excuse defendants' interminable delays, neglect and refusals to comply with Court ordered deadlines. It ignores the delays which despite their protestation to the contrary, were caused as much by defendants due to attorney inconvenience, illness, conflicts and similar matters (A-47, ¶29, A-48,¶30, A-69, A-199). Further, despite his ill health, plaintiff Cohen was produced for examination by defendants for the purpose of defendants' threshold summary judgment motion on four separate occasions, (A-48,¶30).

As defendants knew, Mr. Cohen was frequently travelling for the U.S. Customs Department in performance of official duties as a Chief. (A-41,¶14, A-48,¶30, A-188, ¶16, A-199). Mr. Cohen died shortly after his retirement.

In addition, defendants' document demands in connection with the Cohen depositions were far ranging and involved items far beyond the statue of limitations. Negotiations were extensive. Cohen produced will, books, 64 documents in all (A-48,¶30, A-50,¶36).

The Court below criticizes plaintiffs for failure of counsel to appear for a pre-trial conference but evidentally did not recall the failure of Mr. Singer's office to appear at an early major 1973 pretrial conference. With all counsel already present before Judge Ward, at the Court's suggestion plaintiffs' counsel telephoned to Mr. Singer's office to request his immediate appearance. Instead, an attorney who was wholly uninformed was sent and Judge Ward instructed him to inform Mr. Singer that the summary judgment motion must be forthwith made or waived until trial, and a deadline was set, yet later wholly ignored (A-49,¶33, A-191,¶23, A-201).

At that conference, plaintiffs' request to file a Rule 23 motion resulted in that question again being delayed so that the limitations question could be heard first

(A-49,¶33, A-71, A-72). Yet the Court opinion below does not cite defendants' default or failure to time after time meet the deadlines for their motion (A-201). Yet, when due to a communication lapse, plaintiffs missed one conference at the Court, the opinion below looks unkindly upon plaintiff.

Despite defendants repeated delays followed by their failure and refusal to comply with Court deadlines, the Court still entertained defendants' limitations motion and did not consider it untimely, then or now.

In addition, the Court incorrectly characterizes plaintiffs answers to defendants' interrogatories as untimely or not completely responsive. There is nothing in the record to indicate this. Defendants made no motion with respect to plaintiffs' responses to the interrogatories. There was never a hearing or conference on this subject.

The Court below made such observation solely based upon defendants' self-serving statements as an excuse for their ex post facto refusal to comply with Judge Ward's May 1973 motion deadline (A-201, A-202-203).

Any delay in their production was caused by defendants' refusal and failure to return certain of Cohen's

documents (particularly the ledger) necessary for plaintiffs' review.(A-204). The interrogatories were served and filed promptly after the return of these documents.

CONCLUSION

The Zeckendorf bankruptcy restraining order stayed all formal actions by plaintiffs.

Defendants threshold summary judgment motion took precedence over plaintiffs' class motion.

The request for class relief was before the Court in the pleadings.

Neither defendants nor the Court acted or took exception to plaintiffs' request for class designation.

Sizeable delays were occasioned as much by defendants as by plaintiffs.

Defendants suffered no prejudice.

Based on the foregoing, the District Court's order denying class status to plaintiff-appellant should be reversed and plaintiff-appellant should be granted such class status.

Respectfully submitted

IRA JAY SANDS

By: Ira Sands

Attorney for Plaintiff-Appellant

OF COUNSEL: STEVEN SISKIND
STANLEY YAKER

US COURT OF APPEALS: SECOND CIRCUIT

Index No.

ESTHER FRIEDLANDER,
Plaintiff-Appellant,

against

PETER I. FEINBERG, et al,
Defendants-Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Victor Ortega, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 1027 Avenue St. John, Bronx, New York

That on the 29th day of November 1974 at 61 Boradway, New York deponent served the annexed Brief (cover*) upon

POLLACK & SINGER

the in this action by delivering 2 true copies thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega
Print name beneath signature

VICTOR ORTEGA

Sworn to before me, this 29th day of November 19 74

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418860
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

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